IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 10-0132

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ROBERT J. COOK
Petitioner and Appellant,

-vs-

DIANA J. MCCLAMMY
Respondent and Respondent

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# APPELLANT'S REPLY BRIEF

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On Appeal from the Montana Eighth Judicial District Court,
In and for the County of Cascade, Cause No. ADR 03-380,
the Honorable Thomas McKittrick Presided

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CSED, ¶3, 5) the CSED or Mcclammy never gave the Appellant notice it was modifying a district court order,(Cook v Mcclammy, ¶10). These issues are the issues that have been decided and are moot. They cannot be relitigated. (State v Black, (1990) 245 Mont. 39) The lower court's decision/order (Docket 59) does not even mention these relevant decisions and erred in not finding these issues are the moot issues because they have been decided and they cannot be relitigated.

The issues that arose from CSED and Mcclammy not abiding by the above noted decisions and provide the district court erred because this substantial evidence was presented to it and these were not moot issues is that 1) CSED would not return the seized funds,(Docket 41, Exh C,D,E, especially H which shows CSED's claim that money garnished was for support due March 2009 and she directed it released) 2) CSED was still garnishing the Appellant's wages(Docket 41, Exh H,L,M) 3) CSED sent notice to Appellant that he still owed support after decisions of this court and the district court orders stating he did not owe support retroactive to 2006, (Docket 41, Exh L, Tr. p 6, ln 14-25), 4) the CSED did not return monies garnished as it said it would in Cook v State, ¶ 4 and distributed monies to Mcclammy(Docket 41, Exh H, Tr.p 6, ln 25), 5) the CSED changed its stance, ie, it said it was not modifying a district court order and it did not have to have its order approved.(Docket 41, Exh D, Exh G, p4, Docket 47, p 2, 1st ¶; p 5, 1st and 2nd ¶) 6) the CSED actions violated Appellant's due process

rights and violated the district court's jurisdiction. (Docket# 41, p 2, Docket 43, p 1, 4,5,6) Then because of these new undecided issues and the Appellant's failed attempts to get his seized funds back, the Appellant turned to the court for equitable relief and the issue of CSED being joined as a party arose. The substantial evidence presented as issues not decided provides that substantial evidence does exist to support that the district court did err in its decision and abused its discretion.

The Appellant states during hearing that everything is pretty much already decided by the Supreme Court, with the exception of returning seized funds. (Tr. p5, ln 5-7)

The above is the substantial evidence which exists and is in the record which supports the district court did err in its decision. The lower court did not put any of the above in its findings or conclusions in its order. Again, without substantial evidence to support its decision one is left to speculate how the district court came to its conclusion.(See Jones v Jones, (1980) 190 Mont. 221, 224, 620 P.2d 850, 852(see also Jacobsen v Thomas, 333 Mont. 323, ¶19 142 P.3d 859, ¶19.) Further, the court's findings are clearly erroneous if they are not supported by substantial credible evidence. (See In re Estate of Kindsfather, 2005 MT 51, ¶15, see also Marriage of Steinbeisser, 2002 MT 309, ¶17, 313 Mont. 74, ¶17, 60 P.3d 441, ¶17)

The substantial evidence which exists in previous decisions(the issues the Appellant points out as moot) is directly related to this matter and the district court should have acknowledged these decisions in its order as it did during hearing as findings and conclusions of law and erred in not doing so. A mistake of law has occurred. Mcclammy, nor the lower court, elaborates on what issues are moot or why. The lower court did not make any findings or conclusions in its decision to not make CSED a party. The lower court order does state on page 1 of its order(Docket #59) that CSED made a "special appearance" but special appearances have long been abolished. (see Wamsley v Nodak, 2008 MT 56, 341 Mont. 467, 178 P.3d 102). This does not abide by well settled Montana law and is a mistake of law for the lower court to allow a "special appearance."

The lower court does not make any reference to the exhibits presented to it during the briefing process. These exhibits provide substantial credible evidence that support the Appellant's positions and clearly provide the district court abused its discretion. All the exhibits set out in Docket 41,43, 51,52, Exh A-R, Tr. p6, ln 17-23) provide substantial evidence to support the Appellant's position that CSED was still garnishing his wages and would not return seized funds after it was ordered he did not owe support and CSED's ludicrous position it did not have to abide by this Courts decisions and the lower court's order of vacated its child support order.

Mcclammy does not dispute any of the facts the Appellant presented in his brief. Mcclammy does however leave out important relevant factors in her Statement of Case. The CSED participated in the hearing, it did not just respond to briefs. CSED agreed to help the court. Mcclammy does not deny that CSED has statutes for which it can rely on to get reimbursed from her for wrongly distributed funds she received. The Appellant has no way to collect from Mcclammy but the State has more effective ways. For equitable relief to be acquired and because CSED seized the funds, CSED should be required to return it, as was noted in Connell v CSED, 2003 MT 361, ¶9-10.

Mcclammy sets forth her own ISSUE PRESENTED but does not adequately address her issue presented or provide any valid argument against the actual issues that were appealed by Appellant and her argument does not provide any supporting argument or supporting law which supports how the district court did not err when it denied Petitioner's motions. Mcclammy does not dispute the facts of the case. She claims in her argument that substantial evidence exists to support the decision of the district court but nowhere in the brief is this "substantial evidence" set out. Mcclammy refers to the order of Cook v State, supra, but does not directly refer to specifics of the order which would support her argument or dispute the Appellant's direct reference's to the Order. Mcclammy does not once in her brief clarify what "issues" are moot and how or why. She claims the issues are moot but not provide

any argument as to why the district court ruling should be deemed correct. Mcclammy does not even acknowledge that Cook v Mcclammy, which is directly related, states the Appellant owes no support or that in Cook v State, supra, the CSED requested this Court take Judicial Notice of Cook v Mcclammy, supra.(Docket 41, Exh F,G) If a requisite personal interest exists at the commencement of the *litigation(standing)* and continue throughout its existence(mootness) the issue is not moot. See Plan Helena v Helena Regional Airport Authority and Lewis and Clark County, 2010 MT 26, ¶10. See also Greater Missoula v Child Start, 2009MT 362, ¶23, which states:

> "Thus, if the issue presented at the outset of the action has ceased to exist or is no longer "live," or if the court is unable due to an intervening event or change in circumstances to grant effective relief or to restore the parties to their original position, then the issue before the court is moot." (citations omitted).

Based on the above, Plan Helena, supra, and Greater Missoula, supra, the Appellant has standing because the issues the Appellant set forth that have not been decided are still in existence("live") and therefore the issues are not moot as Mcclammy asserts and the district court decided. The lower court has jurisdiction and was able to return the Appellant to his original position in the amount of monies because they were wrongly seized, continued to be seized and continued to be wrongly distributed.

Further, mootness was never an issue set before the lower court by any of the parties. Mcclammy, nor CSED ever claimed the issue of return of funds was moot. The lower court just did not know what to do in this matter as noted in the transcript.(Tr. p10, ln 10-11, p 11, ln 23-24) The order does not provide and findings or conclusions which support the decision of mootness and based on the evidence presented it shocks the conscientious the district court failed to act on its authority and jurisdiction and protect the due process rights of the Appellant. The issues cannot be moot and decided if they had not occurred, ie, CSED still garnishing wages and distributing funds.

This issue of 1) funds already ceased or distributed had not been addressed in any court order; the district court did not address ceased funds in his order on remand so the Appellant presented the issue to the district court. The issue in the previous cases of Cook v State, supra, and Cook v Mcclammy, supra was if the Appellant owed child support. It was decided he did not. The issue presented here is the return of seized funds and from this issue additional issues arose. Mootness does not apply as the return of ceased funds because this issue has never been decided. Any reasonable person would conclude that based on the finding sets out in Cook v Mcclammy and Cook v State that if no support was owed, then monies taken or seized for that reason should be returned. The Appellant had standing to move the court order for relief because 1) CSED refused to cease its collections

after it was aware of the orders that stated Appellant did not owe support, 2) CSED had seized funds after the orders noting that Appellant did not owe support, 3) then CSED distributed the funds to Mcclammy, 4) then CSED claimed it did not modify the courts order, 5) then CSED claimed it did not have to have its order approved after both appeal in Cook v Mcclammy, supra, and Cook v State, identified it did have to have its order approved. Based on the above the actions of CSED, the child support issue was no longer moot because a requisite personal interests existed at the time Appellant had summons issued and filed the motion(s) and still exists for the Appellant and it has continued throughout this appeal because of CSED actions and/or lack thereof and therefore the Appellant had standing to bring forth the issues before this Court and the lower court erred in not ordering the return of funds ceased by CSED. The Court further erred in not making CSED a party. See argument set forth in opening brief under Issue I.

Mcclammy's argument relies solely that the District Court did not error because the issues have already been decided and appealed in Cook v State, CSED, 2009 MT 237N but does not elaborate what these issues are or how this order may be correct. Mcclammy dismisses the decision in Cook v Mcclammy, entirely. Mcclammy does not point out under what bases of law the district court may be correct and it cannot because these findings and conclusions were absent from the District Courts order. Further, Mcclammy does not provide any argument which

may support the district's courts order. The Appellant asserts that the issues that are moot or res judicata are the ones noted as already decided by both other appeals. (Res judicata is defined as "[latin "a thing adjudicated"] 1. An issue that has been definitively settled by judicial decision." See Black's Law Dictionary, 7th Ed.) The issue of child support has been decided and that the Appellant did not owe support. The issue(s) presented herein(i.e., return of seized funds or wrongfully taken funds as the lower court referred, Tr. p12) were not decided and appealed and these issues are not moot. The issue that CSED continued to collect and seize funds under an order not approved by district court and distribute them has not been decided and is not moot. The issue of whether CSED was properly served has not been decided and is not moot. The issue that CSED does have to have its child support order approved has been decided in Cook v Mcclammy, and Cook v State, CSED, and it states that CSED has to have its order approved by the district court but the issues that CSED is ignoring this law has not been decided and is not moot. The issue that the CSED did not have its order approved and continued to seize funds and wrongly distribute them and CSED's claims CSED was not modifying a district court order has not been decided and are not moot. These things cannot be moot because they occurred after the decisions in Cook v State. The district court failed to decide these issues and substantial evidence exists in the Appellant's exhibits to support these issues are ripe.

## CONCLUSION

Based on the arguments and settled laws of Montana set forth in Appellant's opening brief and the Appellant's Reply brief the district court erred and the district order needs to be reversed in its entirety. Further based on M.R.Civ.P. Rule 19(5) and MCA §37-61-42, which states:

> "An attorney or party to any court proceeding who, in the determination of the court, multiplies the proceedings in any case unreasonable and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct."

This court should properly ordered CSED to pay the costs incurred in this matter.

Although Mcclammy requested CSED's services, the CSED has multiplied these proceedings ten-fold by not following statutory law and the decisions set out regarding this matter and therefore, the Appellant should be awarded his costs and fees directly related. Further, in order for equitable relief to be obtained CSED needs to return all the funds it seized regardless of which amount the state kept and or how much it distributed to Mcclammy. The CSED's failure to file a reply brief in the time allotted by the rules supports the Appellant's arguments to be well taken. The Respondent at no time has argued that the CSED should not be required to return the funds.

The Appellant only addressed Mcclammy's Issued Presented herein because she did not provide arguments against the Issues on Appeal presented by the Appellant in his opening brief. The Appellant of course still sets forth the arguments presented in the opening brief on the issues he presented and further requests the relief asked for therein also.

Dated this 7th day of July, 2010.

ROBERT JAMES COOK.

Appearing Pro se

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing APPELLANT REPLY BRIEF with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing APPELLANT REPLY BRIEF upon each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

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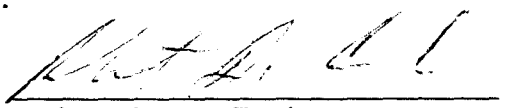

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## CERTIFICATE OF COMPLIANCE

I, Robert James Cook, hereby certifies the foregoing Appellant Reply Brief complies with Rule 27, M.R.App.P, as follows: the brief has been double spaced, except for indented material which has been single spaced; the brief is proportionally spaced by Word, typeface is New Times Roman normal font; point size used is 14 point and the word count is 2,657 and the page count is 12 excluding covers, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

Dated this 7th day of July, 2010.

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